

Dennis F. Dunne (admitted *pro hac vice*)
Samuel A. Khalil (admitted *pro hac vice*)
MILBANK LLP
55 Hudson Yards
New York, New York 10001-2163
Telephone: (212) 530-5000
Facsimile: (212) 530-5219

and

Gregory A. Bray (SBN 115367)
Thomas R. Kreller (SBN 161922)
MILBANK LLP
2029 Century Park East, 33rd Floor
Los Angeles, California 90067
Telephone: (424) 386-4000
Facsimile: (213) 629-5063

*Counsel for the Official Committee
of Unsecured Creditors*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the Lead
Case, No. 19-30088 (DM).*

**RESPONSE AND RESERVATION OF
RIGHTS OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO
DEBTORS' AND AD HOC SUBROGATION
GROUP'S JOINT BRIEF IN SUPPORT OF
THE SUBROGATION WILDFIRE CLAIMS
AS IMPAIRED CLASSES FOR ALL
PURPOSES UNDER THE DEBTORS' JOINT
CHAPTER 11 PLAN OF REORGANIZATION**

Date: January 29, 2020
Time: 10:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Docket Nos. 4540, 4897, 4886 &
5173

In accordance with the Court's *Order Establishing Pre-Confirmation Briefing and Hearing*

1 *Schedule for Certain Legal Issues* (the “Briefing Order”) [Docket No. 4540], the Official
2 Committee of Unsecured Creditors (the “UCC”) appointed in the chapter 11 cases of the above-
3 captioned debtors (the “Debtors”) filed a statement and reservation of rights on November 27,
4 2019 (the “Initial ROR”) with respect to “whether HoldCo Subrogation Wildfire Claims or Utility
5 Subrogation Wildfire Claims that are settled and allowed as provided in the Subrogation Claims
6 Settlement . . . are impaired for chapter 11 plan purposes.” See Docket No. 4897. Among other
7 things, the Initial ROR stated that any briefing by the UCC on the Subrogation Claim Impairment
8 Issue (as defined in the Briefing Order) would be premature prior to the Court rendering a final
9 decision on the RSA Motion.
10

11 On December 19, 2019, the Court approved the RSA Motion. See Docket No. 5173. As
12 now approved, it is the restructuring support agreement (the “Subro RSA”)¹—not the Debtors’
13 anticipated plan of reorganization (the “Debtors’ Plan”)—that both allows the claims of the
14 Subrogation Claimants and mandates their treatment. The Debtors’ Plan merely affords the
15 Subrogation Claimants the very bundle of rights they bargained for and obtained under the Subro
16 RSA. Because the Debtors’ Plan does not alter or modify any of those rights in any way, the
17 Subrogation Claims are not impaired under the Debtors’ Plan as presently proposed.
18

19 In their *Joint Brief in Support of the Subrogation Wildfire Claims as Impaired Classes for*
20 *all Purposes Under the Debtors’ Joint Chapter 11 Plan of Reorganization* [Docket No. 4886], the
21 Debtors and the Subrogation Claimants (together, the “Settlement Proponents”) argue that the
22 concessions made by the Subrogation Claimants in the Subro RSA amount to impairment under
23 the Debtors’ Plan, but the Subro RSA makes it clear that the Subrogation Claimants bargained
24 away the rights at issue when they signed the Subro RSA and that their decision to do so was *not*
25 contingent upon confirmation of the Debtors’ Plan. Specifically:
26
27

28

¹ Capitalized terms not defined herein have the meanings ascribed to them in the Subro RSA.

- 1 • The Subro RSA *immediately* grants the Subrogation Claimants an allowed \$11
2 billion claim *for all purposes* in these cases;
- 3 • The allowance of the Subrogation Claims at \$11 billion expressly is not contingent
4 on confirmation of the Debtors' Plan, because that allowance *expressly survives*
5 termination of the Subro RSA, even when that termination occurs because the
6 Debtors' Plan is *not* confirmed;
- 7 • While the Settlement Proponents try to blur the line between the effects of the Subro
8 RSA and the Debtors' Plan by suggesting that there is a variety of circumstances
9 under which the allowance of the Subrogation Claims may be unwound, the truth
10 is that the *sole* instance where this unwinding is in the Debtors' control is the
11 termination of the Subro RSA as a result of the Subrogation Claimants' breach
12 thereof. Otherwise, the right to unwind the claim allowance rests solely with the
13 *Subrogation Claimants*, who reserved for themselves the ability to opt out of the
14 settlement (Subro RSA § 5(f)(iii)(D)); and
- 15 • The Settlement Proponents point to the Subro RSA provision that allows the
16 Debtors to file a plan that diverges from the terms of the Subro RSA in the event
17 the Debtors are insolvent. But even in that circumstance, the allowance of the
18 Subrogation Claims survives for all purposes and remains binding on all parties
19 unless *the Subrogation Claimants* decide otherwise.

20 In short, the now Court-approved Subro RSA establishes, many months in advance of
21 confirmation and on a virtually irrevocable basis *vis a vis* the Debtors, the respective rights and
22 obligations of the Debtors and the Subrogation Claimants with respect to the Subrogation Claims:
23 in exchange for the allowance "for all purposes" of the \$11 billion Subrogation Claims, the
24 Subrogation Claimants agreed to the treatment of those claims as specified in the Subro RSA. As
25 proposed, the Debtors' Plan does not alter or modify those bargained-for rights in any manner. It
26 is the Subro RSA, not the Debtors' Plan, that "did the work" here to modify the rights of the
27 Subrogation Claimants. Accordingly, as long as the Debtors honor their Court-approved
28 obligations under the Subro RSA, the Subrogation Claims are not impaired.

29 **I. The Subrogation Claims Are Unimpaired Under the Debtors' Plan Because the**
30 **Debtors' Plan Provides the Subrogation Claimants with Precisely the Rights for**
31 **Which the Subrogation Claimants Bargained in the Subro RSA.**

32 The Subro RSA leaves no doubt that the Settlement Proponents' intent was that the
33 settlement would be effective immediately upon its approval by the Court. See Subro RSA § 27

1 (“this Agreement shall be effective and binding on all Parties upon (a) execution and delivery of
2 signature pages to the Company of Consenting Creditors . . . and (b) entry of the RSA Approval
3 Order.”).

4 Furthermore, the Subro RSA is unambiguous that the agreed-upon allowance of the
5 Subrogation Claims is to be “for all purposes” and “binding on all parties:”

- 6
- 7 • Subro RSA § 4: “The Parties agree to settle the Subrogation Claims for an
8 aggregate allowed claim amount of \$11 billion pursuant to Bankruptcy Rule 9019
9 (the “Allowed Subrogation Claim Amount”). ***The Allowed Subrogation Claim
Amount, shall be binding the Chapter 11 Cases, and shall survive termination of
this Agreement***, except as otherwise expressly provided in this Agreement”;
 - 10 • Subro RSA § 5(b): “For the avoidance of doubt, following a termination pursuant
11 to this Section 5(b) [Automatic Termination] ***the Allowed Subrogation Claim
Amount shall be binding in the Chapter 11 Cases, and shall survive termination
of this Agreement***”;
 - 12 • Subro RSA § 5(e)(ii): “For the avoidance of doubt, following a termination
13 pursuant to this Section 5(e)(ii), unless otherwise ordered by a court of competent
14 jurisdiction or governmental entity, ***the Allowed Subrogation Claim Amount shall
be binding in the Chapter 11 Cases, and shall survive such termination of this
Agreement***, subject to the right of the Requisite Consenting Creditors to deliver an
15 Allowance Termination Notice as set forth above”; and
 - 16 • Subro RSA § 5(f)(iii)(D): “[A]bsent the delivery of an Allowance Termination
17 Notice, the occurrence of an Insolvency Termination, or termination by the Debtors
18 of this Agreement in accordance with Section 5(e)(i) hereof, ***the Allowed
Subrogation Claim Amount, and each holder’s share thereof, shall remain an
19 allowed claim and binding in these Chapter 11 Cases even if a Debtor is in breach
20 of this Agreement.***”

21 The net result of these provisions is that the only circumstance under which the allowance
22 of the Subrogation Claims can be unwound are upon a decision ***by the Subrogation Claimants*** to
23 terminate the Subro RSA or a decision by the Debtors to terminate only as a result of a breach by
24 the Subrogation Claimants.

25 On December 19, 2019, the Court entered its order approving the Subro RSA (the “Subro
26 RSA Order”). See Docket No. 5173. The Subro RSA Order further reinforces the immediate
27 effects of the Subro RSA:
28

1 The Subrogation Claims are hereby allowed in the aggregate amount of \$11 billion.
2 The allowance of the Subrogation Claims in the aggregate as set forth herein shall
3 be binding in the Chapter 11 Cases (including following conversion to cases under
4 chapter 7 of the Bankruptcy Code or appointment of a chapter 7 or chapter 11
trustee) ***for all purposes including following termination or annulment of the***
[Subro] RSA, except as expressly set forth in the [Subro] RSA.

5 Subro RSA Order ¶ 7 (emphasis added).

6 The terms of the Subro RSA and the Subro RSA Order make clear that when the Court
7 approved the Subro RSA, the parties' rights and obligations with respect to the Subrogation Claims
8 were fixed as consensually altered. The parties had agreed upon—and the Court allowed—the
9 \$11 billion in Subrogation Claims. The parties had further agreed, with the Court's approval, that:
10 (a) the Debtors would be obligated to treat the Subrogation Claims as provided in the Subro RSA,
11 and (b) so long as the Subro RSA remained in effect, the rights the Subrogation Claimants had on
12 account of the Subro RSA were defined by that agreement. While the Debtors' ability to
13 implement the agreed-upon treatment through the ultimate distributions was necessarily
14 conditioned upon the confirmation and effectiveness of a plan, the parties' rights with respect to
15 enforcement of the Subrogation Claims and their treatment were effectively settled. As long as
16 the Debtors abide by the Subro RSA and confirm a plan that conforms therewith, the rights of the
17 Subrogation Claimants that were fixed when the Subro RSA Order was entered will be fully
18 respected—and therefore unimpaired.

19 Ignoring this reality, the Debtors' Plan classifies the Subrogation Claims as impaired and
20 gives the Subrogation Claimants the right to vote. This obvious ploy to try to ensure that the
21 Debtors are able to obtain at least one impaired accepting class for the Debtors' Plan, however, is
22 contrary to the well-established principle that claims that are settled pre-confirmation are not
23 impaired as long as the settlement terms are honored under a subsequently confirmed plan.

24 In re Drexel Burnham Lambert Grp., 130 B.R. 910 (S.D.N.Y. 1991) ("Drexel I"), aff'd,
25 960 F.2d 285 (2d Cir. 1992) ("Drexel II"), is particularly instructive. The Drexel debtors filed for
26

1 bankruptcy protection following a settlement of a massive securities fraud litigation, which
2 required the creation of a \$350 million fund to be administered by the SEC for the benefit of the
3 holders of securities litigation claims against Drexel (the “SEC Fund”). Drexel I, 130 B.R. at 913.
4 After funding only \$200 million of the SEC Fund, Drexel filed for bankruptcy protection. Id.
5 Postpetition, in light of the impracticability of estimating tens of thousands of individual securities
6 litigation claims, with the strong encouragement of the District Court (which had withdrawn the
7 reference with respect to the estimation of these claims), the Drexel debtors, the SEC and
8 representatives of securities litigation claimants negotiated a settled estimation of the securities
9 litigation claims (the “Postpetition Settlement”) to be effectuated through a plan of reorganization
10 on agreed terms (the “Drexel Plan”).
11

12 Pursuant to the Postpetition Settlement, the Drexel debtors agreed to fund the remaining
13 \$150 million into the SEC Fund, and all securities litigation claims were to be channeled to the
14 SEC Fund to be satisfied pursuant to complex procedures the parties agreed to (with no recourse
15 to the estates). Drexel II, 960 F.2d at 288. Eight securities litigation claimants objected to the
16 Postpetition Settlement and asserted that their claims were impaired by the Drexel Plan. Id. at 289.
17

18 The District Court both approved the Postpetition Settlement and ruled that the claims of
19 the objectors were not impaired by the Drexel Plan. Drexel I, 130 B.R. at 928. Specifically, the
20 District Court held that: (i) once finally approved, the Postpetition Settlement will “establish the
21 legal, equitable and contractual rights” of all securities litigation claimants, and (ii) the Drexel Plan
22 gives the securities litigation claimants “precisely the consideration the [Postpetition] Settlement
23 establishes to be the collective rights of the Class, thereby leaving the Class unimpaired.” Id.
24

25 The Second Circuit affirmed, agreeing with the District Court’s finding that it was the
26 Postpetition Settlement that established the rights of the securities litigation claimants, while the
27 Drexel Plan “would not alter or otherwise infringe the class members’ rights,” thus leaving them
28

1 “unimpaired within the meaning of 11 U.S.C. § 1124(1).” Id. at 290. Accord In re SM 104 Ltd.,
2 160 B.R. 202, 215 n.25 (Bankr. S.D. Fla. 1993) (explaining that, where the claimant’s rights had
3 been modified by a settlement, and the plan simply incorporated the settlement’s terms, the claim
4 was unimpaired).

5
6 Indeed, as the Settlement Proponent themselves point out, in In Matter of Wabash Valley
7 Power Ass’n., 72 F.3d 1305 (7th Cir. 1996), the Seventh Circuit has made a distinction between
8 claims that have been finally settled *prior to* confirmation (these are unimpaired when a plan
9 simply implements the settlement terms) and those whose settlement is *contingent on* plan
10 confirmation (these are impaired). See id. at 1310, 1321 (finding claim impaired where the
11 settlement provided that the future plan “shall allow” it in a certain amount, but stating that where
12 “a claim has been settled prior to confirmation of a reorganization plan . . . confirmation . . . leaves
13 the parties’ rights unaffected.”). Accord In re Lower Bucks Hosp., 471 B.R. 419, 457 (Bankr. E.D.
14 Pa. 2012) (finding a settlement to be “inextricably linked” to the plan where its enforceability was
15 expressly contingent on the occurrence of the plan’s effective date); In re Save Our Springs
16 (S.O.S.) Alliance, Inc., 388 B.R. 202, 239 (Bankr. W.D. Tex. 2008) (finding claim to be impaired
17 where its settlement was “contingent upon confirmation”).
18

19 **II. The Debtors’ Attempts to Obfuscate the Immediate and Practically Irrevocable**
20 **Effects of the Subro RSA Are Belied by the Very Terms of that Agreement.**

21 Ignoring the clear import of the rights that were cemented when the Court approved the
22 Subro RSA – and especially the fact that the allowance of the Subrogation Claims expressly
23 survives even if the Debtors’ Plan is *not* confirmed, the Settlement Proponents assert that “the
24 Subrogation Claims Settlement is plainly *conditioned on*, and *inextricably intertwined with*,
25 confirmation and consummation of the Debtors’ Plan,” and that “under certain circumstances,
26 there is no requirement to pay the \$11 billion Allowed Claim Amount in cash, and/or the Allowed
27 Claim Amount no longer would be binding on anyone in the Chapter 11 Cases. *See* RSA §§
28

1 2(a)(ii)-(iii), 3(a)(i), 4, 5(c). Debtors' Brief at 14 (Docket No. 4886) (emphasis added).

2 However, the specific Subro RSA provisions they cite in support of these assertions in no
3 way make the Subro RSA conditioned or otherwise dependent on the confirmation of the Debtors'
4 Plan (in fact, they have the opposite effect):

- 5 • Sections 2(a)(ii)-(iii) merely require the Subrogation Claimants to affirmatively
6 vote in favor of the Debtors' Plan, with a carve-out in the event the Debtors pivot
7 to a different plan;
- 8 • Section 3(a)(i) merely requires the Debtors to file the Debtors' Plan with a carve-
9 out that permits the Debtors to deviate from the Subro RSA if they are insolvent
10 (but does not unwind the allowance of the Subrogation Claims);
- 11 • Section 4 simply provides for the allowance of the Subrogation Claims in the
12 amount of \$11 billion and states that: "[t]he Allowed Subrogation Claim Amount
13 shall be binding in the Chapter 11 Cases, and shall survive termination of this
14 Agreement, except as otherwise expressly provided in this Agreement" (*i.e.*, subject
15 solely to the Subrogation Claimants' limited election rights); and
- 16 • Section 5(c) provides that the Allowed Subrogation Claim Amount will survive
17 termination of the Subro RSA unless the Subrogation Claimants elect otherwise.

18 Furthermore, the litany of the various ways in which the Debtors' Plan allegedly "alters
19 the legal, equitable, or contractual rights of holders of Subrogation Wildfire Claims," *i.e.*, the
20 substitution of the Subrogation Wildfire Trust as the new obligor, the non-payment of postpetition
21 interest on the Allowed Subrogation Claim Amount, and a delay in the distribution, changes
22 nothing. By agreeing to the Subro RSA, the Subrogation Claimants have agreed to *all* of the
23 settlement terms, including those they list as supposedly indicative of "impairment." The fact that
24 the plan simply incorporates the terms the parties have previously agreed to does not transform the
25 alteration of rights through their settlement agreement into a plan impairment. See, e.g., Drexel I,
26 130 B.R. at 928 (where the reorganization plan gives the claimants "precisely the consideration
27 the Settlement establishes to be the[ir] collective rights," the plan does not impair their claims); In
28 re SM 104 Ltd., 160 B.R. at 215 n.25 ("The fact that the plan purports to incorporate [the settlement
terms] is irrelevant. The plan merely confirms the [settled terms] and in no way alters any rights"

1 set forth in the settlement agreement).

2 Based on all of the foregoing, given that the Subrogation Claims have already been allowed
3 for all purposes in these cases regardless of whether the Debtors' Plan is ultimately approved, the
4 Subrogation Claims are clearly unimpaired.
5

6 **III. UCC Reservation of Rights.**

7 The UCC continues to challenge the Debtors' position that the Subrogation Claims are
8 impaired. However, to the extent the Court holds otherwise, the UCC respectfully submits that
9 any impairment determination should be expressly limited to the Subro RSA as approved by the
10 Court and the Debtors' Plan as currently on file. To the extent the Subro RSA or the applicable
11 provisions of the Debtors' Plan are modified, the UCC reserves its rights to ask the Court to revisit
12 the Subrogation Claim Impairment Issue under then-applicable facts.
13

14
15 Dated: January 10, 2020

16 **MILBANK LLP**

17 /s/ Thomas R. Kreller
18 DENNIS F. DUNNE
19 SAMUEL A. KHALIL
20 GREGORY A. BRAY
21 THOMAS R. KRELLER

22 *Counsel for the Official Committee of*
23 *Unsecured Creditors*
24
25
26
27
28